

## 11.6 Age Discrimination—Defenses

### Comment

The following instructions address affirmative defenses and limitations on remedies. The appropriate affirmative defenses will depend on the plaintiff's theory of liability.

The bona fide occupational qualification (BFOQ) defense allows, under certain circumstances, an employer to facially discriminate on the basis of age when the discrimination is reasonably necessary to its business. 29 U.S.C. § 623(f)(1). *See* Instruction 11.7 (Age Discrimination—Defenses—Bona Fide Occupational Qualification).

The bona fide seniority system defense provides that an employer is not liable under the ADEA when its decisions are based on a legitimate seniority system that does not require involuntary retirement. 29 U.S.C. § 623(f)(2)(A). *See* Instruction 11.8 (Age Discrimination—Defenses—Bona Fide Seniority System).

After-acquired evidence is a judicially crafted equitable doctrine that allows an employer to avoid reinstatement and front pay and to limit an award of back pay to the period of time between unlawful termination and the time at which the employer discovered that plaintiff's "wrongdoing was of such severity that the [plaintiff] in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362-63 (1995); *see also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996); 11.9 (Age Discrimination—Defenses—After-Acquired Evidence).

The bona fide employee benefit plan defense allows an employer to approximately equalize the costs of providing nonwage benefits to employees of differing ages. 29 U.S.C. § 623(f)(2)(B). *See* Instruction 11.10 (Age Discrimination—Defenses—Bona Fide Employee Benefit Plan).

The reasonable factor other than age (RFOA) defense excuses liability under the ADEA when a decision is based on any reasonable and legitimate business consideration other than the age of the employee. 29 U.S.C. § 623(f)(1). *See* Instruction 11.11 (Age Discrimination—Defenses—Reasonable Factor Other Than Age).